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NOTE AND COMMENT.

CIVIL LIABILITY FOR FALSE TESTIMONY.—A unique issue is raised in the recent decision of *Schaub* v. *O'Ferrall* (Md. 1911) 81 Atl. 789. The plaintiff, an attorney retained by a woman to represent her in a pending divorce suit against her husband, and to recover property due her, in part assigned by her to the attorney, declares in an action on the case against the husband and third persons, including a partner of the husband, the lawyer representing him, and a witness in the divorce proceedings, for procuring, pursuant to a conspiracy between them, false and defamatory testimony, which defeated the previous action and damaged the present plaintiff's reputation. The court sustained a general demurrer, holding that the plaintiff was bound by the decision as to the rights of the parties made in the previous suit.

On the hypothesis that the decision does not rest solely on a question of pleading, the case presents various issues of interest. The plaintiff's loss of property involves the doctrine of *res judicata;* the allegation of slander would seem to present a question depending upon different and distinct rules of law.

On the first ground, no dispute can be maintained touching the immunity of the witness from liability. The authorities are uniform in holding that the fact that a judgment was secured by the perjured testimony of a witness does not render such witness liable to an action for damages prosecuted by the one against whom judgment was obtained. Witnesses must be able to speak freely, unaffected on the stand by the possibility of future intimidation from litigants, when if they do speak falsely, a criminal indictment awaits them. *Godette* v. *Gaskill,* 151 N. C. 52, 65 S. E. 612, 24 L. R. A., (N. S.) 205; *Grove* v. *Brandenburg,* 7 Blackf. 234; *Cunningham* v. *Brown,* 18 Vt. 123; *Damport* v. *Sympson,* Cro. Eliz. 520. The same rule, if not the identical reason, is applicable to the successful party who gave false testimony, so long as the original judgment remains unreversed. 1 FREEMAN, JUDGMENTS (Ed. 4), Sec. 289; 1 CYC. 687; *Gusman* v *Hearsey,* 28 La. Ann. 709, 26 Am. Rep. 104; *Horner* v. *Schinstock,* 80 Kan. 136; *Page* v. *Camp,* Kirby (Conn.) 7; *Curtis* v. *Fairbanks,* 16 N. H. 542. Nor is a party civilly liable for confederating with witnesses, or for suborning witnesses to commit perjury, *Stevens* v. *Rowe,* 59 N. H. 578, 47 Am. Rep. 231; *Dunlap* v. *Glidden,* 31 Me. 435, 52 Am. Dec. 625; *Parker* v. *Huntington,* 7 Gray 36, 66 Am. Dec. 455; *Bostwick* v. *Lewis,* 2 Day 477, whether the original action proceeded to judgment or not. *Young* v. *Leach,* 50 N. Y. Supp. 670, 27 App. Div. 293. When properly limited, the statement of the court in *Taylor* v. *Bidwell,* 65 Cal. 489:—"If the very person who has committed the supposed injury is not answerable civilly, surely the person procuring it will not be amenable," is true as well as logical. The basis for the two latter rules—discouragement of vexatious suits, and speedy termination of litigations—were succinctly outlined by Chancellor KENT in the leading case of *Smith* v. *Lewis,* 3 Johns, 157, 3 Am. Dec. 469.

In equity similar reasoning and doctrines are followed. A bill charging fraud not extrinsic or collateral, but such as was in issue in the original suit, will not suffice to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction. Perjury and subornation of perjury are generally held not collateral, but the true ground for denial of relief in these cases is, as in actions at law, public policy. See note 25 Am. St. Rep. 167; *Gray* v. *Barton,* 62 Mich. 186, 28 N. W. 813; *Ross* v. *Wood,* 70 N.Y. 8; *Pico* v *Cohn,* 91 Cal. 129, 25 Pac 970; *U. S.* v. *Throckmorton,* 98 U. S. 61. *Dringer* v. *Receiver of Erie Ry.,* 42 N. J. Eq., 573; *Folsom* v. *Folsom,* 55 N. H. 78. But some relaxation is observable in a few jurisdictions, which permit judgment to be vacated and a new trial granted because of material perjured testimony. *Peagram* v. *King,* 2 Hawks 605, 11 Am. Dec. 793; *Laithe* v. *McDonald,* 12 Kan. 340; *Fabrilias* v. *Cock,* 3 Burr. 1771; *Nugent* v *Metropolitan St. Ry. Co.* 46 App Div. 105.

Is the law as stated properly applied in the principal case? So far as *res judicata* is involved therein, the above cases are concerned only with the parties to the suit. A transaction between other parties neither benefits nor injures those not interested. 1 FREEMAN, JUDGMENTS (Ed. 4), § 154. The law would have no purpose in extending civil immunity for subornation of perjury to strangers. Such is the principle of *Rice* v. *Coolidge,* 121 Mass. 393, 23

Am. Rep. 279, where a stranger, defamed by false testimony, was given recovery in damages against one not a party to the suit who suborned the witness to commit the perjury. It seems inexplicable that, in the principal case, the attorney of the defendant husband in the divorce proceedings, should be deemed a party thereto. "If a lawyer who brings a suit procures an unjust judgment against his adversary, by suborning witnesses, bribing judge, jury, or arbitrators, or by other corrupt or illegal practices, we know of no legal reason why he should not be responsible for his illegal acts to the party injured. He is not exonerated because, for reasons which do not apply to him, a joint tort-feasor cannot be reached." *Hoosac Tunnel Dock & El. Co.* v *O'Brien,* 137 Mass. 424, 50 Am. Rep. 323. It would seem therefore, that unless the allegation of a conspiracy and the non-liability of some members destroy the case against all, that the attorney, who is joined as defendant in the principal case should be responsible in law for his work in procuring a former judgment by perjured testimony.

Moreover, the doctrine of *res judicata* concerns itself not merely with the parties to the former action and to no others, but only with the issues previously contested and decided. In the principal case, the declaration alleges slander, a fresh cause of action, distinct from the allegation of loss of property, and not *res judicata.* In this regard the case is novel, and presents questions whose determination must rest on principle rather than authority.

The witness is, of course, not liable for the defamation. Her privilege, in a jurisdiction that adopts the English rule, as Maryland has, is absolute. ODGERS, LIBEL AND SLANDER, (1st Am. Ed.) 191; *Seaman* v. *Netherclift,* 46 L. J. C. P. 128. But does it follow, either logically or necessarily, that the exemption extends to the other defendants, who suborned her? If the purpose of the privilege of a witness in court be understood to be grounded on designs of public policy, to protect the witness, to prevent intimidation and secrecy, to obtain justice even at the expense of some injurious results, the answer seems to be evident. The privilege does not emasculate the defamation; it shields the particular individual who utters it. It may be argued that as no one else spoke, no one else is liable for slander. But if C utters a slander at A's request, or pursuant to an authority from A, or to an understanding between them, should A not be responsible? See BURDICK, TORTS (2nd Ed.) p. 300. If then, despite the privilege, the slander still exists, its instigators, it is submitted, are not excused from legal liability. The remarks of the court in *Rice* v. *Coolidge, supra* are pertinent:—"The argument, that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal, is not satisfactory to our minds. The perjured witnesses and the one who suborns them are joint tort-feasors, acting in conspiracy or combination to injure the party defamed. The fact that one of them is protected from a civil suit by a personal privilege, does not exempt the other joint tort-feasor from such suit. A similar argument was disregarded by the court in *Emery* v. *Hapgood,* 7 Gray 55 Here it was held that the defendant, who instigated and procured an officer to arrest the plaintiff upon a void warrant, was liable to an action of tort therefor, although the

officer who served the warrant was protected from an action, for reasons of public policy."

"But," says the Maryland court, " an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." Such is the law. *Saville* v. *Roberts,* 1 Ld. Raym. 374, 378; *Dowdell* v. *Carpy,* 129 Cal. 168; *Stevens* v. *Rowe,* 59 N. H. 578. But even that does not invalidate the case against the suborners. True, the allegation of a civil conspiracy means little, but its ineffectiveness is not applicable here. For the acts of those who procured the witness to swear falsely are not identical with the act of the witness on the stand. To make them liable for those acts is not obnoxious to the general rules that there can be no civil action for perjury or subornation of perjury in most cases. "The false testimony is not the sole moving factor in the cause of action. The fraudulent purpose or intent, formed before the trial, the fraudulent concoction of the scheme, are the chief bases of the cause of action. The acts of the defendant on the trial are but a part of an entire transaction." See *Verplank* v. *Van Buren,* 78 N. Y. 247, 259. The plaintiff, being defamed, has been injured; the defendants, except the witness, are entitled to no privilege. Why should they not be liable for their unlawful acts? S. W. D.

REVIEW BY THE COURTS OF THE DECISIONS OF THE LAND DEPARTMENT.—The Land Department of the United States is a quasi-judicial tribunal, invested with authority to hear and determine claims to the public lands, and created to supervise all the various steps required for the acquisition of the title of the government. Proofs as to settlement on the lands and their improvement, offered in compliance with the law, are to be presented, in the first instance, to the office of the district where the land is situated, and from its decision an appeal lies to the commissioner of the general land office, and from him to the Secretary of the Interior. It has long been the established rule that the decisions made by the Secretary of the Interior and his subordinate officers, upon questions of fact presented for their determination, in cases within their jurisdiction in the official business of the land office, and in the absence of fraud, misrepresentation, or mistake, are final and conclusive and cannot be reviewed or re-examined by the courts. It is equally well established that while the decisions of such officers are conclusive on questions of fact, it is otherwise with regard to their conclusions of law, and it may be broadly stated that the rulings of the Land Department upon questions of law are not binding upon the courts but may be reviewed in an appropriate proceeding.

The facts which may be conclusively passed upon by the land office are all such as are necessary to the issuance of a valid patent, whether relating to the character of the lands in question or to action on the part of claimants and, in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack. For specific instances see note to *Hartman* v. *Warren,* 76 Fed. 157, 22 C. C. A. 30.